



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 21, 2013

Ms. Elizabeth Hanshaw Winn
Assistant County Attorney
Transactions Division
County of Travis
P.O. Box 1748
Austin, Texas 78767-1748

OR2013-14613

Dear Ms. Winn:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 497058.

The Travis County District Attorney's Office (the "district attorney's office") received a request for specified transcripts of testimony given during a trial styled *State of Texas v. Ismael "Kino" Flores* and any documents or evidence admitted at the trial or obtained during the related investigation that relate to a named individual or named business. You state the district attorney's office has released some of the requested information. You claim some of the submitted information is not subject to the Act. You claim the remaining submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request because it does not consist of transcripts of testimonies or documents or evidence. The district attorney's office need not release nonresponsive information in response to this request, and this ruling will not address that information.

You assert the information you have marked constitutes records of the judiciary. The Act applies only to information that is "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body."

Gov't Code § 552.002(a)(1). However, the Act's definition of "governmental body" "does not include the judiciary." *See id.* § 552.003(1)(B). Information that is "collected, assembled or maintained by or for the judiciary" is not subject to the Act. *Id.* § 552.0035(a); *see also* Tex. Sup. Ct. R. 12. Consequently, records of the judiciary need not be released under the Act. *See* Attorney General Opinion DM-166 (1992). *But see Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ); Open Records Decision No. 646 at 4 (1996) ("function that a governmental entity performs determines whether the entity falls within the judiciary exception to the . . . Act."). This office has determined a grand jury, for purposes of the Act, is a part of the judiciary and is, therefore, not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by another person or entity acting as an agent for a grand jury are considered to be records in the constructive possession of the grand jury and, therefore, are not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 398 (1983). *But see* ORD 513 at 4 (defining limits of judiciary exclusion). However, the fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Information held by another person or entity but not produced at the direction of the grand jury may well be protected under one of the Act's specific exceptions to disclosure, but such information is not excluded from the reach of the Act by the judiciary exclusion. *See id.*

In this instance, you state the information you have marked is maintained by the district attorney's office on behalf of the grand jury. Thus, this information is in the custody of the district attorney's office as an agent for the grand jury. Accordingly, we find the information you have marked consists of records of the judiciary that are not subject to release under the Act, and the district attorney's office need not release this information in response to this request.¹

You have also marked information you seek to withhold under section 552.111 of the Government Code. Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

¹As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You state the responsive information you have marked was made in anticipation of litigation in *State of Texas v. Ismael "Kino" Flores* and consists of the mental impressions, opinions, conclusions, and legal theories of attorneys from the district attorney's office and their representatives. Upon review of your representations and the documents at issue, we find you have demonstrated the work product privilege applies to the responsive information you have marked. Accordingly, the district attorney's office may withhold the responsive information you have marked under section 552.111 of the Government Code.

In summary, the information you have marked consists of records of the judiciary that are not subject to release under the Act, and the district attorney's office need not release this information in response to this request. The district attorney's office may withhold the responsive information you have marked under section 552.111 of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at <http://www.texasattorneygeneral.gov/open/>

[orl_ruling_info.shtml](#), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 497058

Enc. Submitted documents

c: Requestor
(w/o enclosures)